Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of BellSouth Corporation, *et al.*	)	CC Docket No. 97-208
Pursuant to Section 271 of the	)	
Communications Act of 1934, as amended,	)	
To Provide In-Region, InterLATA Services	)	
In South Carolina	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 24, 1997 **Released: December 24, 1997**

By the Commission: Chairman Kennard and Commissioners Ness, Furchtgott-Roth, and Powell issuing separate statements.

TABLE OF CONTENTS

		Paragraph
I.	INTRODUCTION	1
II.	BACKGROUND	3
	A. Statutory Framework	3
	B. Overview	6
III.	STATE AND DEPARTMENT OF JUSTICE CONSULTATION	29
	A. State Review of BOC Compliance with Section 271(c)	29
	B. Department of Justice's Evaluation	33
IV.	STANDARD FOR EVALUATING SECTION 271 APPLICATIONS	37
	A. Burden of Proof for Section 271 Applications and Compliance with Requirement that Application be Complete When Filed	37
	B. Submission of New Factual Evidence and New Arguments in Reply Comments	39
V.	COMPLIANCE WITH SECTION 271(c)(1)(B)	46

A. Background 46
B. Evidence in the Record 49
C. Discussion 57
1. Section 271(c)(1)(A) 57
2. Section 271(c)(1)(B) 58
a. Summary 58
b. Standard for Evaluating Qualifying Requests 59
c. Existence of "Qualifying Requests" in South Carolina 65

VI. CHECKLIST COMPLIANCE 77
A. "Generally Offering" Each Checklist Item 77
1. Introduction 77
2. Discussion 79
B. Operations Support Systems 82
1. Introduction 82
2. Description of BellSouth's Operations Support Systems 90
3. General Approach to Analyzing Operations Support Systems 96
4. Analysis of Ordering and Provisioning Functions 101
5. Analysis of Pre-Ordering Functions 147
C. Access to Unbundled Network Elements 182
1. Summary 182
2. Background 183
3. Evidence in the Record 186
4. Discussion 195
5. Other Concerns 210
D. Resale of Contract Service Arrangements 212
1. Background 212
2. Discussion 215
E. Nondiscriminatory Access to 911 and E911 Services 225

VII. JOINT MARKETING 231
A. Background 231
B. Discussion 236

VIII. CONCLUSION 240

IX. ORDERING CLAUSES 241

APPENDIX LIST OF COMMENTERS

I. INTRODUCTION

1. On September 30, 1997, BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively, BellSouth) filed an application for authorization under section 271 of the Communications Act of 1934, as amended,[1] to provide in-region, interLATA services in the State of South Carolina.[2]

2. In this Order, we conclude that BellSouth is not eligible to proceed under section 271(c)(1)(B) and that it has not yet demonstrated that it generally offers each of the items of the competitive checklist set forth in section 271(c)(2)(B). In light of these conclusions, we need not and do not, address the issue of whether BellSouth has demonstrated that the authorization it seeks is consistent with the public interest, convenience, and necessity.[3]

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[1] 47 U.S.C. § 271. Section 271 was added by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), *codified at* 47 U.S.C. § 151 *et seq.* We will refer to the Communications Act of 1934, as amended, as "the Communications Act" or "the Act." The Telecommunications Act of 1996 will be referred to as "the 1996 Act."

[2] *Application by BellSouth Corp., BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208 (filed Sept. 30, 1997) (BellSouth Application); *see also Comments Requested on Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in South Carolina*, Public Notice, DA 97-2112 (rel. Sept. 30, 1997) (*Sept. 30th Public Notice*). All cites to the "BellSouth Application" refer to BellSouth's "Brief in Support of Application." References to all affidavits or other sources contained in the appendices submitted by BellSouth are initially cited to the Appendix, Volume, and Tab number indicating the location of the source in the record. Subsequent citation to affidavits are cited by the affiant's name, *e.g.*, "BellSouth Wright Affidavit." Comments on the current application are cited herein by party name, *e.g.*, "Intermedia Comments." Documents, such as affidavits and declarations, submitted by commenters are cited by the affiant's name and the entity submitting the affidavit, *e.g.*, "AT&T Bradbury Aff.," "MCI King Decl." A list of parties that submitted comments or replies is set forth in the Appendix. On October 1, 1997, AT&T Corp. (AT&T) and LCI International Telecom Corp. (LCI) filed a motion asking the Commission to dismiss BellSouth's application. *See Motion of AT&T & LCI Int'l Telecom Corp. to Dismiss BellSouth's 271 Application for South Carolina*, CC Docket No. 97-208 (filed Oct. 1, 1997) (*AT&T/LCI Motion to Dismiss*). Pursuant to our September 19, 1997, Public Notice, we treat this motion as early filed comments. *See Revised Procedures for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, FCC 97-330, at 8 (rel. Sept. 19, 1997) (*Sept. 19th Public Notice*).

[3] 47 U.S.C. § 271(d)(3)(C).

II. BACKGROUND

A. Statutory Framework

3. The 1996 Act conditions Bell Operating Company (BOC)[4] provision of in-region, interLATA services on compliance with certain provisions of section 271.[5] Under section 271, BOCs must apply to the Federal Communications Commission (Commission) for authorization to provide interLATA services originating in any in-region state.[6] The Commission must issue a written determination approving or denying each application no later than 90 days after receiving such application.[7] In acting on a BOC's application for authority

[4] For purposes of this proceeding, we adopt the definition of the term "Bell Operating Company" contained in 47 U.S.C. § 153(4).

[5] We note here that, for the provision of international services, a U.S. carrier must obtain section 214 authority. *See* 47 U.S.C. § 214; *see also Streamlining the International Section 214 Authorization Process and Tariff Requirements*, Report and Order, 11 FCC Rcd 12884 (1996); *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, FCC 97-398 (rel. Nov. 26, 1997). The requirement to obtain a section 214 authorization will apply to a BOC even after it receives its section 271 authority to provide in-region, interLATA service. Several BOCs have applied for, and have obtained, section 214 authority to provide out-of-region, international services. *See, e.g., NYNEX Long Distance Co., Ameritech Communications, Inc., Bell Atlantic Communications, Inc., Application for Authority Pursuant to Section 214 of the Communications Act, as amended, to Provide International Services from Certain Parts of the United States to International Points through Resale of International Switched Services*, Order, Authorization and Certificate, 11 FCC Rcd 8685 (Int'l Bur. 1996).

[6] 47 U.S.C. § 271(d)(1). The Modification of Final Judgment (MFJ), which ended the government's antitrust suit against AT&T, and which resulted in the divestiture of the BOCs from AT&T, prohibited the BOCs from providing interLATA services. *See United States v. Western Elec. Co.*, 552 F. Supp. 131, 226-234 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Western Elec. Co.*, Civil Action No. 82-0192 (D.D.C. Apr. 11, 1996) (vacating the MFJ). For purposes of this proceeding, we adopt the definition of the term "in-region state" that is contained in 47 U.S.C. § 271(i)(1). We note that section 271(j) provides that a BOC's in-region services include 800 service, private line service, or their equivalents that terminate in an in-region state of that BOC and that allow the called party to determine the interLATA carrier, even if such services originate out-of-region. *Id.* § 271(j). The 1996 Act defines "interLATA services" as "telecommunications between a point located in a local access and transport area and a point located outside such area." 47 U.S.C. § 153(21). The 1996 Act defines a "local access and transport area" (LATA) as "a contiguous geographic area (A) established before the date of enactment of the [1996 Act] by a [BOC] such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or (B) established or modified by a [BOC] after such date of enactment and approved by the Commission." 47 U.S.C. § 153(25). LATAs were created as part of the MFJ's "plan of reorganization." *United States v. Western Elec. Co.*, 569 F. Supp. 990, 1057 (D.D.C. 1983), *aff'd sub nom. California v. United States*, 464 U.S. 1013 (1983). Pursuant to the MFJ, "all [BOC] territory in the continental United States [was] divided into LATAs, generally centering upon a city or other identifiable community of interest." *United States v. Western Elec. Co.*, 569 F. Supp. at 993.

[7] 47 U.S.C. § 271(d)(3).

to provide in-region, interLATA services, the Commission must consult with the Attorney General and give substantial weight to the Attorney General's evaluation of the BOC's application.[8] In addition, the Commission must consult with the applicable state commission in order to verify that the BOC has either a state-approved interconnection agreement or a statement of generally available terms and conditions (SGAT) that satisfies the "competitive checklist."[9]

4. Section 271 requires the Commission to make several findings before approving BOC entry. A BOC must show that it satisfies the requirements of either section 271(c)(1)(A),[10] known as "Track A," or section 271(c)(1)(B), known as "Track B." Section 271(c)(1)(B), which we treat as the pertinent section for purposes of this Order, provides that a BOC meets the requirements of Track B if no competing provider has requested the access and interconnection described in section 271(c)(1)(A) before the date that is three months before the BOC's section 271 application is filed.[11] In addition, a statement of the generally available terms and conditions that the BOC offers to provide such access and interconnection must have been approved or permitted to take effect by the applicable State commission under section 252(f). In order to grant a BOC's application, the Commission must also find that the SGAT approved or allowed to take effect by the state under section 252 offers all of the items included in the competitive checklist contained in section 271(c)(2)(B),[12] that the requested

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[8] *Id.* § 271(d)(2)(A).

[9] *Id.* § 271(d)(2)(B).

[10] Section 271(c)(1)(A) provides, in relevant part:

> A [BOC] meets the requirements of [section 271(c)(1)(A)] if it has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the [BOC] is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers. For the purpose of [section 271(c)(1)(A)], such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominately over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.

[11] Section 271(c)(1)(B) provides, in relevant part:

> A [BOC] meets the requirements of [section 271(c)(1)(B)] if, after 10 months after the date of enactment of the [1996 Act], no such provider has requested the access and interconnection described in [section 271(c)(1)(A)] before the date which is 3 months before the date the [BOC] makes it application under [section 271(d)(1)], and a statement of the terms and conditions that the [BOC] generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f).

[12] 47 U.S.C. § 271(d)(3)(A)(ii).

authorization will be carried out in accordance with the requirements of section 272,[13] and that the BOC's entry into the in-region interLATA market is "consistent with the public interest, convenience, and necessity."[14]

5. To date, the Commission has considered two BOC applications for the provision of in-region, interLATA services pursuant to section 271 of the Act. Specifically, on June 25, 1997 the Commission denied Southwestern Bell's application to provide in-region, interLATA services in Oklahoma,[15] and on August 19, 1997, the Commission denied the application of Ameritech Michigan to provide in-region, interLATA services in Michigan.[16] These orders interpret various section 271 requirements.

B. Overview

6. We conclude in this order that BellSouth has failed to demonstrate that it complies with the competitive checklist contained in section 271 of the Act. We recognize, however, that BellSouth has made progress in opening its local market to competition. BellSouth states that it has invested hundreds of millions of dollars to create an organizational structure to meet the needs of new entrants as they seek to compete in BellSouth's market. BellSouth has also negotiated more than 80 agreements with competing carriers to provide competitive service in South Carolina. Moreover, as was the Department of Justice, we are encouraged by BellSouth's efforts to develop systems that accommodate the needs of smaller competing carriers. We commend BellSouth for the efforts that it has made thus far.

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[13] *Id.* § 271(d)(3)(B). The Commission has adopted various rules implementing the accounting and nonaccounting safeguards contained in section 272. *See, e.g., Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), Order on Reconsideration, 12 FCC Rcd 2297 (1997), *further recon. pending, petition for summary review in part denied and motion for voluntary remand granted sub nom., SBC Communications v. FCC*, No. 97-1118 (D.C. Cir. filed Mar. 6, 1997) (held in abeyance pursuant to court order filed May 7, 1997), *on remand*, Second Order on Reconsideration, FCC 97-222 (rel. June 24, 1997), *petition for review pending sub nom., Bell Atlantic Telephone Companies v. FCC*, No. 97-1423 (D.C. Cir. filed July 11, 1997); *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996), *recon. pending*.

[14] 47 U.S.C. § 271(d)(3)(C).

[15] *See Application by SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121, Memorandum Opinion and Order, FCC 97-228 (rel. June 26, 1997) (*SBC Oklahoma Order*), *petition for review pending sub nom., SBC Communications, Inc. v. FCC*, No. 97-1425 (D.C. Cir. filed July 3, 1997).

[16] *See Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-137 (rel. Aug. 19, 1997) (*Ameritech Michigan Order*), *recon. pending*.

7. The 1996 Act's overriding goal is to open all telecommunications markets to competition and, ultimately, to deregulate these markets.[17] Before the 1996 Act's passage, the BOCs, the local progeny of the once-integrated Bell system, were barred by the terms of the MFJ from entering certain lines of business, including long distance services. The ban on BOC provision of long distance services was based on the MFJ court's determination that such a restriction was "clearly necessary to preserve free competition in the interexchange market."[18] The court found that, if the BOCs were permitted to compete in the interexchange market, they would have "substantial incentives" and opportunity, through their control of local exchange and exchange access facilities and services, to discriminate against their interexchange rivals and to cross-subsidize their interexchange ventures.[19]

8. In this Order, we find that BellSouth is ineligible to proceed under Track B. We find that BellSouth has failed to meet its burden to demonstrate that it has received no qualifying requests for access and interconnection that, if implemented, would satisfy the requirements of section 271(c)(1)(A). We also clarify our standard for evaluating the type of requests for access and interconnection that preclude a BOC from proceeding under section 271(c)(1)(B). In addition, we analyze BellSouth's SGAT for compliance with the competitive checklist, as described below.

9. Through the competitive checklist and the other requirements of section 271, Congress has prescribed the mechanism by which the BOCs may enter the in-region, long distance market. This mechanism replaces the structural approach of the MFJ that prohibited BOCs from participating in that market. Although Congress supplanted the MFJ, it nonetheless acknowledged the principles underlying that approach -- that BOC entry into the long distance market could have significant anticompetitive effects unless the BOCs first open their local markets to competition. Accordingly, Congress set up a framework that requires BOCs to demonstrate that their local markets are open to competition *before* they are permitted to enter the in-region long distance market. In order to effectuate Congress' intent, we must make certain that the BOCs have opened their local markets and thus allow competition to develop in those markets.

10. Section 251 of the 1996 Act contemplates three paths of entry into the local market -- the construction of new networks, the use of unbundled elements of the incumbent's

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[17] The purpose of the 1996 Act is to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans *by opening all telecommunications markets to competition*." Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (Joint Explanatory Statement) (emphasis added).

[18] *United States v. Western Electric Co.*, 552 F. Supp. at 188.

[19] *Id.* Although never called upon to make final evidentiary conclusions, the court found it appropriate "to consider whether the state of proof at trial was such as to sustain th[e] divestiture as being in the public interest." *Id.* at 161.

network, and resale.[20] Section 251(c)(2), for example, imposes on all incumbent local exchange carriers (LECs)[21] the duty to provide for interconnection between the incumbent's network and the new entrant's network. This provision enables customers using a new entrant's facilities to receive and place calls to customers on the incumbent's network. Section 251(c)(3) imposes on all incumbent LECs the duty to provide unbundled network elements, and section 251(c)(4) requires incumbents to offer their retail services to new entrants at discounted rates so that the new entrants can resell those services. Neither section 251 nor our rules implementing that section express a preference for one particular entry strategy. As the Commission concluded, "given the likelihood that entrants will combine or alter entry strategies over time, an attempt to indicate such a preference in our section 251 rules may have unintended and undesirable results."[22] The Commission has established rules that are intended to guarantee that all pro-competitive entry strategies are available. In order to ensure efficient entry, each potential competitor must be able to choose the entry strategy that it believes is most appropriate under the circumstances.

11. These critical, market-opening provisions of section 251 are incorporated into the competitive checklist found in section 271. For example, the competitive checklist requires BOCs to demonstrate that they provide interconnection in accordance with section 251(c)(2).[23] The checklist also requires BOCs to show that they provide access to unbundled network elements in accordance with the requirements of section 251(c)(3), and to

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[20] 47 U.S.C. § 251; *see also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15509 (1996) (*Local Competition Order*), Order on Reconsideration, 11 FCC Rcd 13042 (1996) (*Local Competition First Reconsideration Order*), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996) (*Local Competition Second Reconsideration Order*), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997) (*Local Competition Third Reconsideration Order*), *further recon. pending.* Petitions for review of the First Report and Order were filed in a number of federal courts. Those petitions were consolidated and assigned by lottery to the United States Court of Appeals for the Eighth Circuit. *See* 28 U.S.C. § 2112(a)(3). On July 18, 1997, the Eighth Circuit issued its decision affirming in part and vacating in part certain portions of the First Report and Order. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *modified on reh'g*, No. 96-3321 (Oct. 14, 1997) (*Rehearing Order*). The Commission and numerous other parties have filed petitions for certiorari with the United States Supreme Court challenging the Eighth Circuit's decision. *See AT&T Corp. et al. v. Iowa Utils. Bd.*, No. 97-826 (Nov. 17, 1997); *MCI Telecommunications Corp. v. Iowa Utils. Bd.*, No. 97-829 (Nov. 17, 1997); *Association for Local Telecommunications Services et al. v. Iowa Utils. Bd.*, No. 97-830 (Nov. 17, 1997); *FCC & United States v. Iowa Utils Bd.*, No. 97-831 (Nov. 19, 1997).

[21] The term "local exchange carrier" or LEC, means "any person that is engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. § 153(26). We will refer to incumbent local exchange carriers, including BOCs, as "incumbent LECs." "Competing LECs" refers to carriers seeking to enter the local exchange market.

[22] *Local Competition Order*, 11 FCC Rcd at 15509.

[23] 47 U.S.C. § 271(c)(2)(B)(i). Moreover, the competitive checklist requires that the BOC provide interconnection and access to network elements in accordance with section 252(d). *Id* §§ 271(c)(2)(B)(i),(ii).

demonstrate that they provide resale in accordance with the requirements of section 251(c)(4).[24] Section 271 thus places on this Commission the responsibility to ensure that the requirements of section 251 are met before the BOC is allowed into the in-region, interLATA market.

12. In this Order, we conclude that BellSouth has failed to demonstrate that it satisfies the competitive checklist in section 271, and we therefore must deny its application. Although recognizing that BellSouth has made some progress, we identify a number of significant deficiencies in BellSouth's offering of unbundled network elements and resale services. We have attempted, however, to provide guidance where possible to BellSouth regarding what steps it must take in order to comply with section 271.

13. As a preliminary matter, we emphasize that the standards we apply herein to determine whether BellSouth complies with the competitive checklist are firmly rooted in the Act, in our implementing regulations, and in the standards and guidance the Commission promulgated in the *Ameritech Michigan Order*. We are thus not in this Order diverging from the requirements of the Act or in any other way establishing impediments to BOC entry into the interLATA market. We note, however, that BellSouth states that it "disagrees" with certain interpretations of checklist requirements suggested in the Commission's *Ameritech Michigan Order* and that, "in this application BellSouth preserves its positions for resolution by the courts if necessary."[25] As discussed below, we reaffirm, where applicable, the earlier Order.

14. We believe that the deficiencies we identify below in BellSouth's application are ones which we find are likely to frustrate competitors' ability to pursue entry through the use of unbundled network elements or resale, the two methods of entry that promise the most rapid introduction of competition.[26] Specifically, we find that BellSouth has failed to demonstrate that it: (1) offers nondiscriminatory access to its operations support systems; (2) offers nondiscriminatory access to unbundled network elements in a manner that permits competing carriers to combine them; and (3) offers certain retail services at discounted rates as required by the Act.

15. With respect to access to its operations support systems, we conclude that BellSouth has not demonstrated that it is providing nondiscriminatory access to its operations support systems functions, which the Commission has recognized as a prerequisite to the

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[24] *Id.* §§ 271(c)(2)(B)(ii), (iv)-(vi), (xiv).

[25] BellSouth Application at 20.

[26] *See Iowa Utils. Bd.*, 120 F.3d at 816 ("Congress recognized that the amount of time and capital investment involved in the construction of a complete local stand-beside telecommunications network are substantial barriers to entry, and thus required incumbent LECs to allow competing carriers to use their networks in order to hasten the influence of competitive forces in the local telephone business.").

development of meaningful local competition. Incumbent LECs, such as BellSouth, maintain a variety of computer databases and "back-office" systems that are used to provide service to customers. We collectively refer to these computer databases and systems as operations support systems, or OSS. These systems enable the employees of incumbent LECs to formulate customers' orders for telecommunications services, to provide the requested services to their customers, to maintain and repair network facilities, and to render bills.

16. In implementing the local competition provisions of the 1996 Act, the Commission concluded in its August 1996 *Local Competition Order* that much of the information maintained by the incumbents' operations support systems is critical to the ability of other carriers to compete with incumbent LECs using unbundled network elements or resold services. The Commission concluded that, in order to meet the nondiscriminatory access standard for OSS, an incumbent LEC must provide to competing carriers access to OSS functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing that is equivalent to what it provides itself, its customers or other carriers.[27] This decision was upheld by the Court of Appeals for the Eighth Circuit, which agreed with the Commission that the requirement to provide nondiscriminatory access to OSS is an integral part of the 1996 Act's blueprint for opening local markets to competition.[28]

17. In the *Ameritech Michigan Order*, the Commission concluded that the duty to provide nondiscriminatory access to OSS functions is embodied in various terms of the competitive checklist in section 271. Without equivalent access to the BOC's OSS, many items required by the checklist, such as resale services, unbundled loops, unbundled local switching, and unbundled local transport would not be available in a timely manner or at an acceptable level of quality.[29] The Commission found that it was necessary to determine whether the access to OSS functions provided by the BOC to competing carriers sufficiently supports each of the three modes of competitive entry strategies established by the Act: interconnection, unbundled network elements, and services offered for resale. In so doing, the Commission sought to ensure that a new entrant's decision to enter the local exchange market in a particular state is based on the new entrant's business considerations, rather than the availability or unavailability of particular OSS functions to support each of the modes of entry.[30]

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[27] *Local Competition Order*, 11 FCC Rcd at 15766.

[28] *Iowa Utils. Bd.*, 120 F.3d at 809 (the "explicit reference to 'databases, signaling systems, and information sufficient for billing and collection' [in the statutory definition of 'network element'] clearly indicates that operational support systems qualify as network elements under the Act").

[29] *Ameritech Michigan Order* at para. 132.

[30] *Id.* at para. 133.

18. Determining whether a BOC provides nondiscriminatory access to OSS requires the Commission to assess the various components of such access in some detail because these details have clear implications for a new entrant's ability to effectively compete. For example, the details concerning how and when a BOC provides a new entrant information concerning the status of the new entrant's resale order or order for unbundled network elements are critically important. As demonstrated by this case, when one of BellSouth's customers calls a BellSouth representative with questions concerning the status of his or her order for a telecommunications service, BellSouth is generally able to provide such information because it is contained in BellSouth's systems to which its employees have quick and unfettered access. By contrast, when a new entrant seeks to provide service to one of its new customers via resale or unbundled network elements, the new entrant must send its customer's order to BellSouth for processing and, until BellSouth informs the new entrant of the status of that order, either through a confirmation that the order has been processed or through a notice that there is a problem with the order, the new entrant is unable to inform its customer of the status of his or her order. The customer may not understand that the new entrant's inability to provide information on her order may be due to the fact that BellSouth has not returned an order confirmation. To the customer, the new entrant may appear to be a less efficient and responsive service provider than its competitor, BellSouth. Accordingly, it is important that we assess such details of BellSouth's OSS. Our comprehensive review of BellSouth's OSS indicates that it has failed to provide to new entrants information concerning the status of their orders in a timely manner.

19. It is also critical that a new entrant's ability to provide service to its customers in substantially the same time that a BOC can provide service to its customers is not hindered by the BOC's OSS access. Customers will expect similar levels of service from new entrants. If a new entrant cannot provision service in substantially the same time as the incumbent, the customer may decide not to switch carriers. A BOC's failure to timely process a new entrant's order may result in the new entrant losing a potential customer. In order to measure this fundamental gauge of parity, the Commission required in the *Ameritech Michigan Order* that BOCs submit evidence on the average time it takes for the BOC to provide service to a customer and the average time it takes the new entrant to provide service.[31] We note, as did the Department of Justice, that BellSouth has failed to provide meaningful data on this important yardstick.[32] As discussed in detail below,[33] BellSouth has failed to demonstrate that it offers to competing carriers nondiscriminatory access to all of its OSS functions, as required by the competitive checklist. We emphasize that the deficiencies we identify with regard to BellSouth's OSS affect a competitor's ability to enter via resale as well as through the use of

[31] *Ameritech Michigan Order* at para. 166.

[32] Evaluation of the United States Department of Justice, CC Docket 97-208, at 23 (filed Nov. 4, 1997) (Department of Justice Evaluation); *see also infra* paras. 132-140.

[33] *See infra* part VI.B.

unbundled network elements. Nondiscriminatory access to an incumbent's OSS is just as vital to a competitor seeking to enter via resale as to one using unbundled network elements.

20. We also conclude in this Order that entry in South Carolina through the use of unbundled network elements may be hindered by BellSouth's failure to offer unbundled network elements in a manner that allows new entrants to combine them to provide a telecommunications service. In a recent decision, the Eighth Circuit held that requesting carriers, rather than incumbent LECs, have the duty to combine network elements, even if those elements are already combined by the incumbent LEC.[34] Thus, where a BOC uses a combination of network elements to serve a customer, but then loses that customer to a new entrant that intends to provide service to that customer through the purchase of those network elements, the BOC may physically disassemble the combined elements and require the new entrant to incur the costs of recombining them in order to provide service to the same customer. In reaching this decision, the court noted that the statute requires incumbent LECs "'to provide . . . unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.'"[35] We and the industry are still in the early stages of evaluating the implications of the Eighth Circuit's ruling that, although competing carriers may offer services solely through the use of unbundled network elements, the competing carriers must combine those elements themselves. Various methods of combining elements are being discussed by the industry.

21. Pursuant to the provisions of its SGAT, BellSouth asserts that, as a general rule, competitors must use collocation in order to combine network elements.[36] Regardless of the merits of BellSouth's position that collocation is the primary means by which competitors combine elements, we conclude that BellSouth has not demonstrated in the record before us that it offers or can timely provide this method of combining unbundled network elements.[37] For example, BellSouth's SGAT fails to include any provision committing BellSouth to a

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[34] *Iowa Utils. Bd. v. FCC, Rehearing Order* at 1. The court vacated section 51.315(b) of the Commission's rules, which states that "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. §51.315(b).

[35] *Iowa Utils. Bd., Rehearing Order* at 1 (quoting 47 U.S.C. § 251(c)(3)).

[36] BellSouth Reply at 33-34 (BellSouth has identified no other means by which new entrants can combine unbundled network elements). The Act identifies two forms of collocation -- physical collocation and virtual collocation. 47 U.S.C. § 251(c)(6). Physical collocation refers to the placement of a competing carrier's transmission equipment in a segregated space in the incumbent LEC's central office. The competing carrier owns the equipment and has the right to enter its segregated space in the LECs central office. *See infra* part VI.C. Virtual collocation refers to the placement of transmission equipment in a central office, but not in a segregated space, that is dedicated to the competing carrier but is maintained by the BOC.

[37] *See infra* part VI.C. We make no finding as to the appropriateness of physical or virtual collocation as a method of combining network element or whether other methods, such as direct access to an incumbent LEC's network, are required by the Communications Act.

time within which it will implement a request for collocation. We find this omission particularly problematic because the record indicates that, in practice, it is taking BellSouth a long time to implement such requests. If competitors must first construct collocation space in each BellSouth central office from which they wish to provide local exchange service by combining network elements, delays in constructing such space will undermine the Act's goal of the rapid introduction of competition through the use of combinations of network elements. As a result of these and other concerns detailed below, we conclude that BellSouth has not met its burden under section 271 of showing that a competing provider can enter a local telecommunications market in South Carolina by acquiring all necessary elements from an incumbent LEC, as required by section 251 and specifically upheld by the Eighth Circuit.[38]

22. We recognize that local competition has not developed in South Carolina and other states as quickly as many had hoped.[39] This has led to significant frustration and concern that the goals of the Act may not be met. We believe that such pronouncements are premature. The process of opening local markets is highly complex and peculiarly requires the current incumbent to share its facilities in ways that require unprecedented degrees of cooperation and coordination. At the same time, we recognize that the Act directs us to grant a section 271 application under Track B if a BOC satisfies the other requirements of section 271, even if no competing provider has sought to enter a particular state's local market -- and we would not hesitate to do so.

23. Our confidence that local competition is possible is bolstered by recent history. In the 1980s, this country saw a fundamental restructuring in the long distance market following the break-up of the Bell system. The subsequent development of competition in that market is very encouraging, although the pace of the growth of competition in that market was much slower than the pace we seek to achieve in opening local markets to competition. In the decade following divestiture of the BOCs, AT&T's share of interstate long distance revenues fell from approximately 90 percent to 55 percent.[40] In order to make

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[38] *See Iowa Utils. Bd.*, 120 F.3d at 816-17 ("[T]he Act itself calls for the rapid introduction of competition into local phone markets by requiring incumbent LECs to make their networks available to their competing carriers.").

[39] The record suggests that currently there is only limited competition in the provision of local telephone services in South Carolina, particularly in the residential market. According to BellSouth, as of September 11, 1997, no wire-line facility-based local exchange service competition had begun in South Carolina. Competing carriers in South Carolina were providing approximately 1785 resold business local exchange access lines and 573 resold residential local exchange access lines within the state. BellSouth Application, App. A, Vol. V, Tab 16, Affidavit of Gary M. Wright (BellSouth Wright Aff.) at para. 24. Based on this information and information from BellSouth's 1996 8-K Quarterly Report, the Department of Justice estimates BellSouth's market share of local exchange in its service area in South Carolina is 99.8% based on access lines. *See* Department of Justice Evaluation, App. B at B-3.

[40] *Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, 3307 (1995) (*AT&T Reclassification Order*).

such competition possible, it was necessary for the BOCs and other incumbent LECs to offer their customers equal access to all qualified long distance carriers, which required technical modifications to network equipment in thousands of end offices across the country.[41] Such competition also required long distance competitors to build brand recognition and win the trust of customers accustomed to dealing with the Bell system for all of their telecommunications needs.[42]

24. As the Commission discussed in the *Ameritech Michigan Order*, the development of meaningful local competition requires the telecommunications industry to surmount even more daunting hurdles than were faced in the development of competition in the long distance market.[43] The Commission noted that "[n]ew entrants do not have available a ready, mature market for the resale of local services or for the purchase of unbundled network elements, and the processes for switching customers for local service from the incumbent to the new entrant are novel, complex and still largely untested."[44] Moreover, although the largest interexchange carriers enjoy strong brand identification, many of the smaller entrants do not. As a result, the development of local competition is likely to be a gradual process, which will require substantial effort by both incumbent LECs and their potential competitors over an extended period of time. We are confident that such efforts will bear fruit in the foreseeable future.

25. BellSouth contends that approving its application to provide long distance services in South Carolina will provide an incentive for long distance companies to begin competing in the local market. BellSouth argues that it has opened its local market to competition and that these companies are choosing not to enter the local market for strategic reasons.[45] BellSouth's argument presumes that BellSouth's local markets are already open to

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[41] *See generally MTS and WATS Market Structure Phase III: Establishment of Physical Connections and Through Routes among Carriers; Establishment of Physical Connection by Carriers with Non-Carrier Communications Facilities; Planning among Carriers for Provision of Interconnected Services, and in Connection with National Defense and Emergency Communications Services; and Regulations for and in Connection with the Foregoing*, Report and Order, Phase III, 100 FCC 2d 860 (1985).

[42] *See Investigation of Access and Divestiture Related Tariffs*, Phase I, 101 FCC 2d 911 (1985) (finding that the routing of all undesignated interLATA traffic to AT&T was unreasonable and prescribing a pro rata allocation that all LECs were required to put into effect).

[43] *Ameritech Michigan Order* at para. 17.

[44] *Id.*

[45] BellSouth Application at 103; BellSouth Reply Comments at 95-96. BellSouth asserts that until recently the vast majority of competing LECs had no interest in competing in South Carolina, and those that do have an interest have limited themselves to serving business customers. BellSouth further contends that competing LECs' "new expressions of interest have certainly been prompted by hopes of defeating BellSouth's application under Track B." BellSouth Reply at 95; *see also* BellSouth Application, App. C, Vol. 8, Tab 79, South Carolina Commission, *Order Addressing Statement and Compliance with Section 271 of the Telecommunications Act of*

competition and that the lack of local competition in South Carolina is due solely to competitors' failure to devote adequate resources in South Carolina. As discussed above, however, we find in this Order that BellSouth has not yet demonstrated that it complies with the competitive checklist, and that such deficiencies may be hindering successful entry in South Carolina on either a resale basis or through the use of unbundled network elements. BellSouth's entry into the long distance market would surely give long distance carriers an added incentive to enter the local market. But even such an incentive would not be enough to overcome the structural obstacles to competition that new entrants face as a result of BellSouth's failure to provide nondiscriminatory access to OSS and to provide competitors a timely and reasonable means to offer telecommunications service by combining unbundled network elements from BellSouth, as Congress mandated.

26. BellSouth also contends that approving its application will benefit South Carolina consumers because they will then enjoy the benefit of packaged long distance and local services. Although grant of this application would allow the major long distance carriers to market jointly local and long distance services in South Carolina,[46] their ability actually to provide those services in competition with BellSouth's own package of service would be hampered by BellSouth's failure to open its local markets in the manner required by section 271. We share the South Carolina Commission's frustration at the lack of local competition in its state and the desire to make more choices available to its citizens, including the ability to purchase bundled local and long distance services. Our concern, however, is that, unless a BOC first satisfies the requirements of section 271 before it is permitted to offer in-region long distance services as well as local services, the BOC could gain an unfair advantage in the provision of bundled local and long distance service.

27. Finally, we are mindful of the fact that the South Carolina Commission has found that BellSouth does comply with the competitive checklist and, as noted, believes that BellSouth's entry into the long distance market in that state is in the public interest. We must respectfully disagree. In giving substantial weight to the Department of Justice's evaluation, as required by Congress, that BellSouth's market is not open to competition, and in conducting our statutorily required independent assessment, we reach a different conclusion. We must also respectfully disagree with the South Carolina Commission's contention that we should not consider any new issues or facts that were not presented in the state commission

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1996, Docket No. 97-101-C, Order No. 97-640, at 66-67 (July 31, 1997) (*South Carolina Commission Compliance Order*) (approving BellSouth's application "will create real incentives for the major [interexchange carriers] to enter the local market rapidly in South Carolina, because they will no longer be able to pursue other opportunities secure in the knowledge that [BellSouth] cannot invade their market until they build substantial local facilities.").

[46] Section 271(e)(1) of the Communications Act prohibits major interexchange carrier from joint marketing a BOC's resold local services with the carrier's long distance services in a BOC's state until the BOC is authorized to provide in-region long distance services in that state or until 36 months have passed since enactment of the Communications Act, *i.e.*, February 7, 1999, whichever is earlier.

proceeding.[47] Because it is the Commission's statutory duty to determine whether the requirements of section 271 have been satisfied, the Commission is not limited to considering only the issues and facts that were presented in the state commission proceeding.[48] We find no basis in the statute to justify our refusal to consider all information that is pertinent to our evaluation of an application. On the other hand, we emphasize that parties should make every effort to present their views to the state commission in the first instance, where such views can be adequately addressed by other interested parties and subjected to cross-examination.

28. In sum, we conclude in this Order that BellSouth has not demonstrated that it satisfies the competitive checklist. We believe that these deficiencies pose significant obstacles to the development of local competition in South Carolina. We are encouraged, however, by the progress BellSouth has made and believe it is capable of correcting these deficiencies. We are also hopeful that local competition will continue to grow within the state, particularly with the cooperation of BellSouth.

III. STATE AND DEPARTMENT OF JUSTICE CONSULTATION

A. State Review of BOC Compliance with Section 271(c)

29. Under section 271(d)(2)(B), the Commission "shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c)."[49] As the Commission stated in the *Ameritech Michigan Order*, Congress afforded the states this opportunity to present their views regarding the opening of the BOCs' local networks to competition.[50] The Commission further noted that, in order to fulfill this role as effectively as possible, state commissions should conduct proceedings to develop a comprehensive factual record concerning BOC compliance with the requirements of section 271 and the status of local competition.[51] The Commission observed that the Act does not prescribe any standard for Commission consideration of a state commission's verification under section 271(d)(2)(B). The Commission concluded, therefore, that it has discretion in each section 271 proceeding to determine what weight to accord to the state commission's consultation in light of the nature

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[47] South Carolina Commission Comments at 4; South Carolina Commission Reply Comments at 2, 10, 12.

[48] A number of commenters agree that the Commission must make its own independent findings and can use evidence outside that presented in the state commission section 271 proceeding. *See, e.g.*, ACSI Comments at 10 n.35; ALTS Reply Comments at 4-8; CFA Reply Comments at 5-7, 41; Sprint Comments at 4-5; WorldCom Reply Comments at 16-17.

[49] 47 U.S.C. § 271(d)(2)(B). Subsection (c)(1) defines the requirements for Track A or Track B entry, and subsection (c)(2) contains the competitive checklist.

[50] *Ameritech Michigan Order* at para. 30.

[51] *Id.*

and extent of state proceedings to develop a complete record concerning the applicant's compliance with section 271 and the status of local competition. Therefore, although the Commission will consider carefully state determinations of fact that are supported by a detailed and extensive record, it is the Commission's role to determine whether the factual record supports a conclusion that particular requirements of section 271 have been met.[52]

30. The South Carolina Commission has reviewed BellSouth's compliance with the requirements of section 271 and provided us with its written evaluation. After establishing a docket on March 20, 1997, the South Carolina Commission held a public hearing on July 7-10, 1997, during which BellSouth and parties opposing BellSouth's entry into the South Carolina long distance market presented testimony and conducted cross-examinations.[53] On July 22, 1997, the parties submitted their proposed orders,[54] and on July 31, 1997, the South Carolina Commission issued the *South Carolina Commission Compliance Order*, ruling that BellSouth had complied with the requirements of section 271(c). That Order also approved BellSouth's SGAT, with modifications, and concluded that BellSouth had met the competitive checklist, finding that the SGAT makes available to new entrants each of the checklist items.[55] The South Carolina Commission also concluded that BellSouth's entry into the interLATA market would be in the public interest because long distance rates would be lowered, carriers could jointly package local and long distance services to consumers, and competitive providers of local exchange service would be encouraged to enter the local market.[56] That Order did not analyze whether BellSouth had satisfied the requirements of section 271(c)(1)(A) (Track A) or section 271(c)(1)(B) (Track B). The state commission did, however, discuss its views of the state of competition in local telecommunications markets in South Carolina. The

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[52] *Id.*

[53] BellSouth Application, App. C, Vol. 1, Tab 1, South Carolina Commission, *Order Establishing Docket and Time Table*, Docket No. 97-101-C, Order No. 97-223 (Mar. 20, 1997) (*South Carolina Commission Mar. 20, 1997 Order*); *South Carolina Commission Compliance Order* at 2-4; South Carolina Commission Comments at 2-3. Before the hearing, parties submitted comments and testimony to the South Carolina Commission, and exchanged and responded to interrogatories and requests for production of documents. In addition, the South Carolina Commission staff issued its own data requests and conducted investigations. South Carolina Commission Comments at 3. The record contained over 1600 pages of live and prepared sworn testimony and another 1500 pages of pleadings. BellSouth Application at 3.

[54] *See, e.g.*, BellSouth Application, App. C, Vol. 8, Tab 68, BellSouth Proposed Order; BellSouth Application, App. C, Vol. 8, Tab 73, AT&T Proposed Order Regarding Approval of BellSouth's SGAT.

[55] *South Carolina Commission Compliance Order* at 4-6. We note that several commenters argue that we should not defer to the *South Carolina Commission Compliance Order* because the state commission adopted BellSouth's proposed order virtually verbatim instead of exercising its own independent judgment. AT&T Comments at 47-48; AT&T Comments, App., Vol. VIII, Ex. 1, Affidavit of Kenneth P. McNeely (AT&T McNeely Aff.), Attachs. 2-4; MCI Comments at 9-10; MCI Reply Comments at 1-2; WorldCom Reply Comments at 15-16. *But see* BellSouth Reply Comments at 3-6.

[56] *South Carolina Commission Compliance Order* at 6-7.

commission found that, although the local market in South Carolina was open to competition, no potential competitive carriers were taking any reasonable steps toward providing facilities-based local service for business and residential customers.[57]

31. Following the July 31, 1997, release of the *South Carolina Commission Compliance Order*, BellSouth filed on August 25, 1997, a proposed revised SGAT to reflect the July 18, 1997, decision of the United States Court of Appeals for the Eighth Circuit on review of the Commission's *Local Competition Order*.[58] The SGAT approved on July 31, 1997, provided that, if a new entrant combined network elements to produce an existing BellSouth tariffed retail service, the new entrant would be charged the wholesale price for the retail service.[59] The proposed revised SGAT deleted this provision and instead allows competing carriers to use combinations of network elements to provide a telecommunications service that replicates an existing BellSouth retail service if the competing carrier combines those elements itself. The SGAT offers to deliver certain elements to the competing carrier's collocation space for combining.[60] BellSouth also proposed revising the language in the earlier version of the SGAT that offered vertical features, such as call waiting, at the retail

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[57] *Id.* at 18-20.

[58] BellSouth Application, App. C, Vol. 9, Tab 83, BellSouth Comments on SGAT Revisions, Ex. 1; *see* BellSouth Reply Comments, App., Tab 9, Affidavit of Alphonso J. Varner (BellSouth Varner Reply Aff.) at para. 29. On July 18, 1997, the Eighth Circuit held that sections 252(c)(2) and (d) gave state commissions exclusive authority to interpret the pricing terms of sections 251 and 252 and implicitly divested the Commission of any rulemaking role in that area. *See Iowa Utils. Bd. v. FCC*, 120 F.3d at 793-96. Moreover, the court held that the matters governed by the interconnection provisions of the Act are fundamentally intrastate in character, and that any ambiguity regarding the Commission's jurisdiction over pricing and other issues arising under section 251 did not give the Commission jurisdiction with respect to intrastate communications. *Id.* at 796-800, 802-07. The court also vacated the Commission's "pick and choose" rule that had allowed new entrants to select the favorable terms of a prior interconnection agreement. *Id.* at 800-01. In addition, the court upheld the Commission's rules that discounted and promotional offerings were telecommunications services subject to the resale requirements of the Act. *Id.* at 818-19. Furthermore, the court agreed with the Commission that new entrants may provide telecommunications service wholly through the use of unbundled network elements purchased from incumbent LECs at cost-based unbundled network element prices, but vacated the Commission's rules requiring incumbent LECs to combine the network elements for new entrants. *Id.* at 813-15. The court also agreed that vertical features qualify as unbundled network elements. On rehearing on October 14, 1997, the court vacated the Commission's rule prohibiting LECs from separating previously combined network elements requested by a competing carrier. *Iowa Utils. Bd. v. FCC, Rehearing Order*. The Commission and numerous other parties have filed petitions for certiorari with the United States Supreme Court challenging the Eighth Circuit's decision. *See* petitions cited *supra* note 20.

[59] BellSouth Comments on SGAT Revisions, Ex. 1 § II(F)(1).

[60] *Id.* For discussion on SGAT provisions on combining unbundled network elements, see *infra* part VI.C.

price less the applicable wholesale discount.[61] Under the revision, the SGAT now offers vertical features as part of the unbundled local switching functionality.[62] BellSouth also submitted a revised pricing schedule to the SGAT on September 5, 1997, that removed the earlier version's language regarding vertical features and stated instead that no charges would be assessed for vertical features until prices were developed in the South Carolina Commission's pending cost proceeding.[63] The South Carolina Commission approved a later version of the SGAT, incorporating certain of BellSouth's proposed changes (including the ones discussed above), on September 9, 1997, and this revised SGAT was released on September 19, 1997.[64] The September 19, 1997, SGAT is the one that BellSouth relies on here, and it is the one which we review. Unless otherwise expressly noted, all references herein to BellSouth's SGAT refer to the September 19, 1997, revised SGAT.

32. On October 17, 1997, the South Carolina Commission submitted its comments concerning BellSouth's application. The South Carolina Commission reiterated the views expressed in the *South Carolina Commission Compliance Order* -- that no potential competitive carriers were taking any reasonable steps toward providing facilities-based local service for business and residential customers, that BellSouth had satisfied the competitive checklist requirements, and that BellSouth's interLATA entry would be in the public interest because it would promote both local and long distance competition.[65] We note that the South Carolina Commission has addressed every checklist item and has, as suggested in the *Ameritech Michigan Order*, included an analysis of the state of local competition in South Carolina.[66]

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[61] *Id.*, Ex. 1 § VI(A). Vertical features perform certain switching functions beyond the basic switching function of connecting lines and trunks. Examples include call waiting, three-way calling, call forwarding, and caller ID. *See Local Competition Order*, 11 FCC Rcd at 15705-06.

[62] BellSouth Comments on SGAT Revisions, Ex. 1 § VI.

[63] *See* BellSouth Application, App. C, Vol. 9, Tab 91, Revised Attachment A to the Statement of Generally Available Terms and Conditions (BellSouth Revised SGAT Attach. A) at 3.

[64] BellSouth Application, App. B, Vol. 1, Tab 1, *Statement of Generally Available Terms and Conditions for Interconnection, Unbundling and Resale Provided by BellSouth Telecommunications, Inc. in the State of South Carolina* (Sept. 19, 1997) (SGAT); *see* BellSouth Varner Reply Aff. at para. 30; Department of Justice Evaluation at 5 n.3.

[65] South Carolina Commission Comments at 1-16.

[66] *See Ameritech Michigan Order* at para. 34.

B. Department of Justice's Evaluation

33. Section 271(d)(2)(A) requires the Commission, before making any determination approving or denying a section 271 application, to consult with the Attorney General. Under that section, the Attorney General is entitled to evaluate the application "using any standard the Attorney General considers appropriate," and the Commission is required to "give substantial weight to the Attorney General's evaluation."[67] Section 271(d)(2)(A) specifically provides, however, that "such evaluation shall not have any preclusive effect on any Commission decision."[68] The Commission found in the *Ameritech Michigan Order* that the Commission is required to give substantial weight not only to the Department of Justice's evaluation of the effect of BOC entry on long distance competition, but also to its evaluation of each of the criteria for BOC entry under section 271(d)(3), including the state of local competition and the applicant's compliance with the competitive checklist, if addressed by the Department of Justice.[69]

34. In its evaluation of BellSouth's application to provide in-region, interLATA service in South Carolina, the Department of Justice focused on certain deficiencies in BellSouth's showing of compliance with the requirements of section 271. First, the Department of Justice concluded that BellSouth has not fully implemented several elements of the competitive checklist, including the requirement that it provide access and interconnection in accordance with the competitive checklist.[70] In particular, the Department of Justice found that BellSouth has failed to demonstrate that it is providing access to unbundled network elements in a manner that allows requesting carriers to combine them.[71] In making this finding, the Department of Justice noted that the South Carolina Commission has not made any specific findings as to this issue. In addition, the Department of Justice found that BellSouth's SGAT is legally insufficient, because it fails to describe whether or how BellSouth will provision unbundled network elements so that competing carriers may combine them to provide telecommunications services.[72] The Department of Justice explained that the SGAT fails to "specify *what* BellSouth will provide, the *method* in which it will be provided, or the *terms* on which it will be provided," and therefore it could not make a finding that

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[67] 47 U.S.C. § 271(d)(2)(A).

[68] *Id.*

[69] *Ameritech Michigan Order* at para. 37.

[70] Department of Justice Evaluation at 12-13.

[71] *Id.* at 16.

[72] *Id.* at 19-20. For discussion of BellSouth's offering to combine unbundled network elements, see *infra* part VI.C.

BellSouth is offering nondiscriminatory access to unbundled network elements in accordance with the requirements of section 271.[73]

35. Second, the Department of Justice concluded that BellSouth's operations support systems are deficient.[74] Specifically, the Department of Justice found that BellSouth had not demonstrated that the current interfaces for pre-ordering and ordering functions will allow for effective competition. The Department of Justice concluded that, because of the limited capacity of BellSouth's systems, the performance problems new entrants are experiencing will become more serious as they begin to order unbundled network elements or resale services in larger amounts. The Department of Justice also found that BellSouth's failure to institute all of the necessary OSS performance measures "prevents a determination that BellSouth is currently in compliance with checklist requirements or that compliance can be assured in the future."[75]

36. Finally, the Department of Justice concluded that granting BellSouth's application would not be in the public interest, because local markets in South Carolina are not irreversibly open to competition.[76] In making this finding, the Department of Justice explained that it considered whether all three entry paths contemplated by the 1996 Act -- facilities-based entry involving construction of new networks, the use of unbundled network elements, and resale of the BOC's services -- are fully and irreversibly open to competitive entry to serve both business and residential consumers. It examined first the extent of actual local competition, and then whether significant barriers continue to impede the growth of competition and whether benchmarks to prevent backsliding have been established.[77] In concluding that the South Carolina local market is not fully and irreversibly open to competition, the Department of Justice found that substantial barriers to resale competition and competition using unbundled network elements remain.[78] Among the concerns expressed by the Department of Justice was that BellSouth had not demonstrated that current or future prices for unbundled elements would permit efficient entry or effective competition, noting in particular the uncertainty of future prices.[79] Moreover, the Department of Justice found that

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[73] Department of Justice Evaluation at 20.

[74] *Id.* at 28-30.

[75] *Id.* at 28-29.

[76] *Id.* at 1-3, 31-32. The Department of Justice first adopted this standard -- that the local market be fully and irreversibly open to competition -- in its evaluation of SBC's section 271 application to provide in-region, interLATA service in Oklahoma. Department of Justice SBC Oklahoma Evaluation at vi-vii and 36-51.

[77] Department of Justice Evaluation at 2.

[78] *Id.* at 34-35.

[79] *Id.* at 35-44.

BellSouth had failed to demonstrate that the local market would remain open to competition because it had not instituted performance measurements needed to ensure consistent performance in the delivery of service to new entrants.[80] The Department of Justice also rejected BellSouth's estimates of the competitive benefits that would result from BellSouth's entry into the market at this time. Specifically, the Department of Justice found that BellSouth significantly overvalued the benefits of BellSouth's entry into the long distance market and undervalued the benefits to be gained from opening BellSouth's local markets to competition.[81]

IV. STANDARD FOR EVALUATING SECTION 271 APPLICATIONS

A. Burden of Proof for Section 271 Applications and Compliance with Requirement that Application be Complete When Filed

37. Section 271 places on the applicant the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied.[82] In the *Ameritech Michigan Order*, the Commission determined that the ultimate burden of proof with respect to factual issues remains at all times with the BOC, even if no party opposes the BOC's application.[83] In the first instance, a BOC must present a *prima facie* case in its application that all of the requirements of section 271 have been satisfied.[84] Once the applicant has made such a showing, opponents of the BOC's entry must, as a practical matter, produce evidence and arguments necessary to show that the application does not satisfy the requirements of section 271, or risk a ruling in the BOC's favor.[85] Nevertheless, the BOC applicant retains at all times the ultimate burden of proof that its application is sufficient.[86] The Commission also concluded that, with respect to assessing evidence proffered by a BOC applicant, the "preponderance of the evidence" standard is the appropriate standard for evaluating a BOC section 271 application.[87] The Commission further concluded that, "if the Department of Justice concludes that a BOC has not satisfied the requirements of sections 271

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[80] *Id.* at 45-48.

[81] *Id.* at 48-49.

[82] 47 U.S.C. § 271(d)(3); *see Ameritech Michigan Order* at para. 43.

[83] *Ameritech Michigan Order* at paras. 43-44.

[84] *Id.* at para. 44.

[85] *Id.*

[86] *Id.*

[87] *Id.* at para. 45.

and 272, a BOC must submit more convincing evidence than that proffered by the Department of Justice in order to satisfy its burden of proof."[88]

38. In the *Ameritech Michigan Order*, the Commission also required that an application be complete when filed.[89] The Commission concluded that, when a BOC presents factual evidence and arguments in support of its application for in-region, interLATA entry, such evidence must be clearly described and arguments must be clearly stated in its legal brief with appropriate references to supporting affidavits.[90] The Commission stressed that an applicant may not, at any time during the pendency of its application, supplement its application by submitting new factual evidence that is not directly responsive to arguments raised by parties commenting on its application.[91] This prohibition applies to the submission, on reply, of factual evidence gathered after the initial filing that is not responsive to the oppositions filed.[92] Moreover, under no circumstance is a BOC permitted to counter any arguments made in the comments with new factual evidence *post-dating* the filing of those comments.[93] The Commission warned that, if a BOC applicant chooses to submit such evidence, the Commission reserves the discretion either to restart the 90-day clock, or to accord the new evidence no weight.[94] The Commission further found that a BOC's promises of *future* performance to address particular concerns raised by commenters have no probative value in demonstrating its *present* compliance with the requirements of section 271.[95] When a BOC files its application, it must demonstrate that it already is in full compliance with the requirements of section 271.[96]

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[88] *Id.* at para. 46.

[89] *Id.* at para. 50.

[90] *Id.* at para. 60. The Commission further concluded that the obligation to present evidence and arguments in a clear and concise manner also extends to commenting parties. *Id.* In addition, the Commission concluded that, when a BOC submits factual evidence in support of its application, it bears the burden of ensuring that the significance of the evidence is readily apparent. *Id.* at para. 61.

[91] *Id.* at para. 50.

[92] *Id.*

[93] *Id.* at para. 51.

[94] *Id.* at para. 50.

[95] *Id.* at para. 55.

[96] *Id.*

B. Submission of New Factual Evidence and New Arguments in Reply Comments

39. Under the Commission's revised procedures for section 271 proceedings, "[t]he applicant's and third parties' reply comments may not raise new arguments or include new data that are not directly responsive to arguments other participants have raised, nor may the replies merely repeat arguments made by that party in the application or initial comments."[97] In addition, "[a]n applicant may submit new factual evidence in its reply if the sole purpose of that evidence is to rebut arguments made, or facts submitted, by commenters, provided the evidence covers only the period placed in dispute by commenters, and in no event post-dates the filing of the relevant comments."[98] In the *Ameritech Michigan Order*, the Commission determined that it would accord no weight to new factual evidence submitted in the reply comments that does not directly respond to arguments or evidence raised by other parties.[99]

40. In this proceeding, BellSouth filed on December 4, 1997, a motion to strike portions of several parties' reply comments, because BellSouth contends that these reply comments contain new arguments and evidence that could have been presented in initial comments and that "do not answer any comments filed by other parties."[100] Several parties filed responses to BellSouth's Motion to Strike Reply Comments that argue, in general, that their reply comments were proper under our rules governing 271 applications, because their reply comments directly respond to arguments and evidence raised by other parties in their initial comments.[101] In addition, AT&T, in an *ex parte* letter filed on December 8, 1997, argues that the Commission should give no weight to specific new evidence and arguments contained in BellSouth's reply comments and accompanying affidavits that should have been included in the application or that post-date the application but are not directly responsive to another party's comments.[102] On December 19, 1997, BellSouth filed a motion to strike AT&T's December 8 *Ex Parte* letter, because BellSouth argues that the letter did not have the

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[97] *Sept. 19th Public Notice* at 7.

[98] *Id.*

[99] *Ameritech Michigan Order* at paras. 50-54, 59.

[100] *See* BellSouth's Motion to Strike Portions of Reply Comments Raising New Arguments and/or Including New Evidence, filed December 4, 1997 (BellSouth's Motion to Strike Reply Comments).

[101] The following parties filed responses to BellSouth's Motion to Strike: ALTS, Hyperion, KMC Telecom, Vanguard Cellular, WorldCom.

[102] *See* Letter from Roy E. Hoffinger, AT&T, to Magalie R. Salas, Secretary, Federal Communications Commission, Dec. 8, 1997 (AT&T Dec. 8 *Ex Parte*).

correct caption to be considered an *ex parte* letter and was not served on BellSouth as required of motions to strike.[103]

41. One party cited by BellSouth in its Motion to Strike Reply Comments, Intermedia, submits evidence in its reply comments that concerns activity after October 20, 1997, the date on which comments were due.[104] In particular, Intermedia submits evidence that BellSouth has failed to acknowledge receipt of a number of Intermedia's orders in a timely manner during the later part of October and early November.[105] Those portions of Intermedia's factual evidence that post-date the filing of comments are not directly responsive to an argument raised in the comments, because the activity cited by Intermedia occurred after the comments were filed. The Commission determined in the *Ameritech Michigan Order* that "[b]ecause parties are required to file comments within 20 days after a BOC files its section 271 application, commenters will not have placed at issue facts which post-date day 20 of the application. For this reason, under no circumstance is a BOC permitted to counter any arguments with new factual evidence *post-dating* the filing of comments."[106] This same rule applies with equal force to other participants in the proceeding. Because some of the evidence submitted by Intermedia post-dates the filing of comments, and is therefore not responsive to an argument raised in those comments, we strike the evidence in the reply comments to the extent that the evidence concerns activity that occurred after October 20, 1997.[107]

42. We do not, however, grant BellSouth's Motion to Strike Reply Comments with respect to other portions of reply comments that BellSouth cites. These other reply comments do not concern factual evidence of activity that occurred after the filing of comments. Instead, they include arguments or evidence of activity that occurred prior to the comment filing date. Consistent with the *Ameritech Michigan Order*, we consider reply comments only to the extent they are directly responsive to other parties' comments and the evidence

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[103] *See* BellSouth's Motion to Strike AT&T's December 8, 1997 Letter, filed December 8, 1997. (BellSouth's Motion to Strike AT&T's Letter).

[104] *See* Intermedia Reply Comments at 9-12 and Attachs. B and C.

[105] *Id.*

[106] *Ameritech Michigan Order* at para. 51.

[107] We strike those portions of Attachments B and C of Intermedia's reply comments that concern activity occurring after October 20, 1997, and the portions of Intermedia's reply comments on pages 9-12 that rely exclusively on this evidence that post-dates the filing of comments. Although we do not strike those portions of Intermedia's reply comments that concern activity prior to October 20, 1997, as discussed below, we will exercise our discretion and give no weight to the evidence that is not directly responsive to another commenter's arguments and that does not cover the period placed in dispute by commenters. *See infra* para. 42.